SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 73

■

NICK FALBO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

■

ON WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner's
MOTION FOR LEAVE TO FILE OUT OF TIME
Second Petition for Rehearing and for Recall of Mandate to Enable this Court to Reconsider Its Judgment

together with

SECOND PETITION FOR REHEARING

HAYDEN C. COVINGTON
VICTOR F. SCHMIDT
Counsel for Petitioner

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TO THE SUPREME COURT OF THE UNITED STATES:

May it please the court, Nick Falbo presents his motion for leave to file out of time a *Second Petition for Rehearing* and for a recall of the mandate so that the judgment of this court rendered and entered on January 3, 1944, can be reconsidered before jurisdiction is lost by expiration of the present term.

Intervention of the decision in *Billings* v. *Truesdell*

(No. 215, Oct. Term 1943), announced March 27, 1944, construing and clarifying the Selective Service Regulations upon which the previous judgment affirming petitioner's conviction and the order denying rehearing were based, calls for exercise of the court's sound discretion in granting this motion, for reasons fully set forth in the attached *Second Petition for Rehearing*. Viewing the *Falbo* opinion in the clearer light of the *Billings* decision, it now appears that the court confused the "selective process" then in effect for combatants with that for noncombatants (conscientious objectors).

Though this error is simple in essence it is nonetheless grievous in effect. Petitioner earnestly submits that the Court's inferential holding that he had not been "accepted for service" so as to complete the "selective process" is an inadvertent misapprehension of the Regulations. Respectfully, we hasten to show that these very Regulations unmistakably fix petitioner's final acceptance for national service as being the time of his successful completion of his "final-type physical examination" that preceded issuance of the order to report for induction into camp, and which examination petitioner duly passed. The sole intent and purpose of this motion and accompanying petition is to clarify and establish this controlling point which has been misunderstood, to the end that petitioner shall not longer be wrongfully denied the judicial review and defense to which he is justly entitled.

The petition for rehearing attached hereto makes it clear that under the reasoning of the *Billings* case the administrative selective process in the *Falbo* case had been completed long prior to the issuance of the order to report for induction and that the refusal of *Falbo* to submit to induction by reporting at the camp was identical with Billings' refusal to be inducted into the army. Therefore the *Falbo* decision is contrary to the record in this case as well as the Regulations which definitely fix the time of accept-

ance of a conscientious objector. Either there is a direct conflict between the holdings in the *Billings* and *Falbo* cases or else one of the two opinions must be concluded to be founded in rank error. The conflict is further elucidated in the attached second petition for rehearing which is incorporated herein by reference as though copied at length herein.

The *Billings* case reasoning, this motion and the attached petition show clearly that since the judgment rendered on January 3, 1944, and the order of January 31, 1944, overruling the first motion for rehearing, there have been imported into the case elements of importance not exhibited in the briefs, the opinion and the first motion for rehearing which calls for an exercise of this court's discretion to accomplish the good ends of justice. Heretofore petitions for rehearing have been successful when they have called attention of the court to conflict of decisions arising since the former judgment or order rendered in the case. (*Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30, 34, 278 U. S. 587; *Roberts Sash & Door Co.* v. *United States*, 282 U. S. 829) Also where intervening events have imported into the case elements of importance not exhibited originally in the briefs, the opinion or a motion for rehearing. (*Oil Corporation* v. *Bass*, 282 U. S. 830; *Paramount Publix Corporation* v. *American Tri-Ergon Corporation*, 293 U. S. 528; *Duquesne Steel Foundry Co.* v. *Burnet*, 282 U. S. 830; *Jones* v. *Opelika*, 316 U. S. 584; 319 U. S. 103).

As a further ground for granting this motion it should be pointed out that since the entry of the order denying the first motion for rehearing there has been and is now presented to this court a petition for writ of certiorari in the case of *Herman H. Grieme* v. *United States*, filed simultaneously with this motion, in which questions are presented requiring this court to reconsider the decision rendered in this case on January 3, 1944, and which petition urges upon the court to consider whether or not there exists

a conflict in the decisions rendered in the *Billings* case and this case. The petition also urges that this court inadvertently overlooked and confused the material and vital distinction as to the time a conscientious objector is accepted with the time a man classified for the armed forces is accepted. This is analogous to *Triplett* v. *Lowell*, 296 U. S. 570, where the petition for rehearing was granted after questions similar to those raised in the petition had been presented to the court in another case.

The action which the court is here urged to take is similar to that taken by this court on its own motion in the case of *Martin* v. *Struthers*, 318 U. S. 739, where on February 1, 1943, the court vacated its judgment previously entered on October 12, 1942, and recalled its mandate and reconsidered the former judgment rendered in the case.

It should be noted that in the brief of respondent, as well as in the opinion of the court, the time of acceptance of the petitioner for work of national importance was fixed as at the time he reported at the camp, whereas in truth, in fact and in the Regulations themselves, which have the effect of an Act of Congress, the time of acceptance is fixed as at the time of the "final-type physical examination" taken by the petitioner prior to the submission to induction.

This misapprehension is probably due to the fact that this false conclusion was earnestly and eloquently urged upon the court by counsel for the respondent in his brief and at the oral argument, which centered the issue around the contention made by the court below that it was necessary to submit to induction and apply for a writ of habeas corpus as a condition precedent to judicial review. This theory of the court below, although not accepted or discussed by this court in its *Falbo* opinion, was, in the *Billings* case, definitely and expressly rejected as contrary to the Act. There it was explicitly held that a registrant need not submit to induction, but is required only to complete the

selective process so as to qualify himself for judicial review.

It must be admitted and regretted that in *this* case the Government sold to this court the conclusion that *Falbo* had not exhausted his remedies, and persuaded this court to reach an erroneous determination. The Government was traveling at such a rapid rate in urging affirmance of petitioner's conviction that it was unable to see the vital point in this case, which it was moving the court to pass by, so that the court apparently assumed it had considered that point when in fact it was not considered in the court's discussion of the Regulations and the Act.

Petitioner therefore earnestly insists that he was not only wronged and gravely injured by the judgments of the court below, but even more by the erroneous conclusion announced by this court, which has in effect driven him into the wilderness to cry for relief and to plead and replead for the administration of EQUAL JUSTICE UNDER LAW in reference to his case.

Since it is 'human to err and divine to forgive', this court has always recognized and applied the doctrine that it is possible for it to commit mistakes. Mr. Justice Cardozo well describes the nature of the judicial process in his book, *The Nature of the Judicial Process,* thus: "The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. . . . The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined." (pp. 22-23) This principle was most recently applied in *Smith* v. *Allwright,* No. 51 October Term 1943, decided on April 3, 1944, where in the concluding part of the opinion Mr. Justice Reed said that the majority were not "unmindful of the desirability of continuity of decision in constitutional questions . . . when convinced of former error, this court

has never felt constrained to follow precedent", but that the court throughout its history had felt free to "re-examine" the issues and when convinced of error had never felt obliged to follow precedent. Mr. Chief Justice Taney reached the same conclusion in *The Passenger Cases*, 7 How. 283, 470; so also did Mr. Justice Stone in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 94; and also Mr. Justice Brandeis in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406. This principle of reconsideration of precedent and reversing former decisions found to be in error was vitalized and applied by Mr. Justice Roberts in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, reversing *Adkins* v. *Children's Hospital*, 261 U. S. 525; and in *Currin* v. *Wallace*, 306 U. S. 1, and *Mulford* v. *Smith*, 307 U. S. 38, reversing *United States* v. *Butler*, 297 U. S. 1; *Nebbia* v. *New York*, 291 U. S. 502, reversing *New State Ice Co.* v. *Liebmann*, 285 U. S. 262; *Ashton* v. *Cameron County District*, 298 U. S. 513; *Steward Machine Co.* v. *Davis*, 301 U. S. 548, and *Helvering* v. *Davis*, 301 U. S. 619, overturning a precedent decision of long standing.

It is neither wise nor right to cast out upon the public waters an unjust, erroneous decision and refrain from pulling it back, waiting until it washes back to the door of the court in a more increased, involved and complicated form, before reconsideration of the worth and strength of the principle announced and applied. When the proof of the error of the principle or application of the principle is discovered while within the grasp of the court in the very case in which it is announced, even upon a delayed or second motion for rehearing, it is much better than waiting ten years or ninety years before correcting the error as was done in the cases of *Smith* v. *Allwright*, supra, and *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, respectively. Although it is never too late to be right and better to be late in making a correction of error than never, in the field of human relations and fundamental personal rights in crim-

inal proceedings the swiftness of the judicial process is too slow to correct the mistake and cannot restore the irreparable injuries already suffered as a consequence of an unjust rule, or misapplication of an otherwise just rule.

Petitioner fully believes and appreciates the lofty attitude maintained by this court in the interest of justice—that it is much better to be right and administer equal justice under law than to blindly follow precedent; and that in its discharge of that heavy responsibility vital points of a case can escape the attention of the court. Because of this belief, and filled with a conviction that grave error has been committed in this case because of inadvertent misapprehension as to the effect of the Regulations controlling the issues involved, petitioner now moves for leave to file a second petition for rehearing. The fact that the court gave careful attention to the matter on oral argument, fully reviewed the record and briefs and read the first petition for rehearing does not prove conclusively that an error was not committed or that some vital element did not escape the court.

Judge Dillon, in his lectures on the laws and jurisprudence of England and America, declared the proper attitude of the court in matters of this kind, when he said: "Mistake, errors, fallacies and flaws elude us, in spite of ourselves, unless the case is pounded and hammered at the bar." Petitioner has pounded and hammered at the legal issues before the bar of this court to the point of fully exhausting all his legal remedies, and the time has now come for submitting to this court the responsibility of determining whether the error will be rectified or allowed to remain submerged under the mistaken assumption of the opinion that the administrative selective process had not been completed when Falbo was ordered to report.

Conclusion

Wherefore petitioner prays that this court exercise its discretion and grant him leave to file the attached "Second Petition for Rehearing" and that the mandate issued to the lower courts be recalled, and that upon consideration the petition be granted and that the order and judgment heretofore rendered be vacated. Petitioner prays for such other and further relief to which he may show himself justly entitled in the premises.

NICK FALBO, *Petitioner*

By HAYDEN C. COVINGTON
VICTOR F. SCHMIDT
Counsel for Petitioner

Certificate

The undersigned counsel for petitioner hereby certifies that the foregoing motion for leave to file the "Second Petition for Rehearing" is prepared and filed in good faith so that justice may be done, and not for purpose of delay.

HAYDEN C. COVINGTON
Counsel for Petitioner

SECOND PETITION FOR REHEARING

Comes now the petitioner, with leave of court first having been asked and obtained, and presents his second petition for rehearing, asking that the order overruling his first petition for rehearing be vacated and the judgment of affirmance theretofore entered be set aside, and shows as grounds:

That the court erred in failing to hold that petitioner had exhausted all his administrative remedies when by the local board he had been found acceptable for the authorities in control of the civilian public service camps and was accepted and assigned for duty in one of such camps by the administrative agency prior to issuance of the order to report for national service, thereby qualifying him, under the rule announced by the court, for judicial review of the illegality of his classification in defense to the indictment.

OTHER GROUNDS

By specific reference, and for sake of brevity, each and every ground assigned as error in the first petition for rehearing is incorporated herein by reference. No further discussion of the merits of those grounds need be here urged. Although petitioner still dissents from and denies the correctness of the rules of law announced in the Court's opinion of January 3, 1944, he concedes, for purposes of the discussion following, that the rulings of law are proper, and under those rulings petitioner respectfully urges the error in the application of those rules to facts, record and regulations involved in this case.

Discussion

The gist of the opinion in this case was that a registrant may not contest his classification in defense to an indictment under Section 11 of the Selective Training and Service Act unless and *until* the "selective process" has been completed. Manifestly, when the Act and Regulations had been thus construed it was the duty of this court to dispose of the case before it by making proper application of the law thus announced. Specifically, petitioner's fate hung on the narrow question of whether or not the selective process had been completed. But, singularly, the opinion of the court closed without having attempted any application of the rules of law to the facts of record or discussing whether under the regulations he had actually been accepted. Although petitioner's conviction was affirmed, it was nowhere specifically said that the selective process lacked being completed, in conformity with the rule announced, at the time of or before he was ordered to report for national service. In absence of any direct discussion of the point, it was assumed from other observations made by the court that petitioner's conviction was affirmed because he had not reported to the CPS camp and there submitted to induction in response to the order from his local board. R. 59.

But this assumption, viewed now in the light of the court's ruling and discussion in *Billings* v. *Truesdell* (No. 215, Oct. Term 1943, decided March 27, 1944), is shown to be incorrect; for in that case it is clearly pointed out that one *accepted* for service has exhausted his remedies under the Act and it is not necessary that he submit himself to induction in order to reach this point. *Necessarily, then, the only explanation of the affirmance of Falbo's conviction is that, in applying the rules announced, the court inadvertently based its decision on the regulations then governing acceptance and induction of men classified 1-A as eligible for the armed forces, and not the rules governing*

conscientious objectors classified IV-E for national service at CPS camps. When the doctrine announced in the *Billings* case is applied a vast difference appears between the procedure followed with reference to acceptance of men for the armed services and acceptance of men for national service at CPS camps. In fact, upon this difference the qualification of *Falbo* for judicial review properly turns, and a brief discussion thereof suffices to show that the court misapprehended the Regulations when his conviction was affirmed.

Prior to August 21, 1942, when petitioner received his order to report for national service, the procedure for inducting men classified I-A was different than it is now. At that time the final physical examination was given at the induction station immediately before the man's induction into the armed forces. If he passed the physical test he was then, as pointed out in the *Billings* case, "accepted" for the armed services, and then, in a later ceremony, he was "inducted". Under this arrangement, if a man refused to obey the order of his local board to report to the induction station for physical examination and induction, as to him the *selective process* to the point of *acceptance* remained uncompleted, because he had not submitted to final physical examination, the last requisite act of acceptance.

In the *Falbo* opinion the discussion by the court clearly indicates that his conviction was affirmed under the mistaken assumption that he had not submitted himself for this final physical examination so as to become *accepted.* But, as is shown in the next paragraph, under the procedure for acceptance and reception of each registrant classified as a conscientious objector (IV-E) Falbo *had* submitted himself to this final physical examination, and he *had* been accepted by the Selective Service System, the operator of the CPS camps, which acceptance took place before he was ordered to submit to induction.

The procedure followed in the case of conscientious ob-

jectors is correctly summarized in the Government's brief at page 44, where it is said:

"If the registrant is classified IV-E as a conscientious objector to both combatant and noncombatant military service the procedure for assignment to work of national importance is somewhat different. In that case, when his order number is reached in the process of selecting I-A and I-A-O registrants to report for induction into the armed forces, the registrant is summoned for a final type physical examination at the induction station in the same manner as that conducted for other selected men (Reg. 651.1-651.8). If the report of the examination indicates that he is physically and mentally qualified for service, the local board notifies the Director of Selective Service that he is acceptable for work of national importance (Reg. 651.10 (a), 652.1). The Director then assigns the registrant to a camp and upon receipt of such assignment the local board issues an order to the registrant to report for work of national importance (Reg. 652.2, 652.11; see R. 59)."

Taking judicial notice of this procedure prescribed by the Regulations, the appearance of the Government's Exhibit No. 3 (Order to Report for Work of National Importance) in the record [59] conclusively shows that Falbo had previously submitted himself for a final type physical examination at the induction station and had been found acceptable by the local board and assigned by the Director for service in a CPS camp, long before he was ordered to submit to induction.

In other words, petitioner's status at the time he received the order to report at the CPS camp was exactly the same as the status of Billings at the time he was directed to submit to induction and the same as the status of all registrants at present when they have successfully undergone the new "preinduction examination" procedure explained by this court in the *Billings* case. In that case, for the first time, the court marked with clarity the boundaries

of the "selective process", which was not fully explained in the *Falbo* case.

In the *Billings* case, by a construction of the Regulations and the Act, it was ruled that at this point in the proceedings a registrant, when found physically and mentally fit, was to be deemed "acceptable" and is "accepted". The very next step, induction, was not and is not a part of the *selective process*. Unmistakably, the court pointed out that the *Falbo* decision was not to be construed as holding that a man must submit to induction before he could be said to have exhausted his administrative remedies, but that the *selective process* ended when he was accepted and that thereafter he could refuse to submit to induction:

"But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would indeed make a trap of the *Falbo* case by subjecting those who reported for completion of the Selective Service process to more severe penalties than those who stayed away in defiance of the board's order to report."

The foregoing quoted portion of the *Billings* opinion is a forcible demonstration of the court's misapprehension of the Regulations governing Falbo's acceptance and assignment to a CPS camp, and his status at the time he received the order to report for work at the camp. He was not indicted for failing to perform any one of the steps in the selective process, but was prosecuted and convicted for not having reported for the sole purpose of submission to induction into the CPS camp. The last step in the selective process had been completed before the order for induction had issued. He was indicted, prosecuted and convicted for refusal to submit to induction and not for failing to take the last step in the selective process.

Therefore Falbo's refusal to submit to induction for service at the camp is the only assignable reason why this

court ruled that he could not contest the legality of his classification in defense to the indictment. But under the above quoted portion of the *Billings* opinion, Falbo did not have to be "actually inducted" or submit to induction in order to raise this defense. He did not have to report to the camp, be assigned and start to work there any more than did Billings have to take the army oath, be assigned to service in the armed forces and shoulder a gun. When Falbo was found "physically and mentally qualified for general service" upon his final physical examination at the induction station *he was "acceptable* for work of national importance under civilian direction." (Italics added) (Reg. 651.31 (a) (1))[1] He had been officially and finally *accepted*, as indicated by the subsequent notice to report to camp, sent by the Director of Selective Service, who is in charge of the CPS camps. (Reg. 653) Thus Falbo exhausted his administrative remedies and, under the rules set forth in the *Falbo* opinion itself as amended and clarified by the *Billings* opinion, he was then in a position to urge the illegality of his classification as a defense against the indictment.

It can be more readily understood that petitioner had exhausted his administrative remedies when he successfully completed the final physical examination, when the rules governing registrants classified I-A as announced in the *Billings* opinion are contrasted with the situation here. Billings never received any assignment to an army camp because such assignments are not given until after the selectee actually subscribes to the oath at the induction station. But as to conscientious objectors there is no ceremony of subscribing to an oath to mark the beginning of the induction process and the end of the selective process. For this reason conscientious objectors receive their assignment to camp as a matter of course before induction and after they are

[1] 7 Fed. Register 277, Jan. 15, 1942. Eleven months after Falbo's final examination and acceptance this section was slightly amended. See Reg. 651.16 (a), July 15, 1943.

found to be acceptable. Then, later, as previously pointed out, they are merely notified to report for the purpose of submitting to induction and not for selection. The court had no difficulty in holding that when Billings had taken the physical examination he had become accepted and had exhausted his administrative remedies, and his refusal to go further did not, under the *Falbo* rule, deprive him of the right to defend his classification in court. That being true in the case of I-A men, the same rule with greater force of reason applies to those classified as conscientious objectors. Assignment of IV-E men by the Director of Selective Service to a camp is analogous to the assignment of an inductee to an army camp after actual acceptance for induction. The only difference is that in the case of IV-E men the Selective Service System never loses its jurisdiction over the assignee as it does over every I-A man inducted into the army. But that difference does not affect the analogy. In both cases, the assignment is beyond the mark of the end of the selective process and the administrative remedies and it is not necessary for the registrant to comply with an order to be inducted as a part of the "selective process." The final liability for duty and acceptance is fixed for the conscientious objector when he passes the physical examination, because he is thereupon declared acceptable for duty and service and given an assignment to camp. Even if any further physical examination were given to the assignee at the camp (as suggested by the court in footnote 7 of the *Falbo* opinion) that does not mean that those found physically unfit and rejected for service by virtue of any such examination will be *discharged* from service, because Section 653.11 (c) of the Regulations[2], which here has the force of statute, specifically provides that in such case the selectee "will be retained in the camp or hospitalized where necessary." And in Section 653.12[3] it is

[2] 7 Fed. Reg. 248, January 14, 1942.

[3] *Ibid.*

said that one who has reported to the camp must remain there until released or transferred elsewhere by proper authority. Thus, these two sections of the Regulations make it plain that *acceptance* of the registrant for work in a camp as a conscientious objector takes place at the time he is found to be acceptable by the physician at the "final-type physical examination", for if he successfully completes the examination, he is thereafter, as a matter of course, "assigned" and then sent a notice to submit to induction at the camp for work. The language of the Regulations, and the practice of the Selective Service System thereunder, indicates that the status of the man changes from that of a "registrant" at the time he reports at the local board for induction and transportation to the camp to that of a "selectee" or "assignee". Under these considerations, it would be contrary to practice and reason to contend that the administrative process of selection had not been completed until he actually reported at the camp.

The *Falbo* decision is further clarified by the *Billings* opinion, which holds: "Moreover, it should be remembered that he who reports at the induction station [for purpose of selection] is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts." (Bracketed words added)

It might well be asked, What is the procedure outlined in the *Falbo* case, and wherein did Falbo fail to follow that procedure? The answer to the first part of this question is found in the *Falbo* opinion in these words: "The connected series of steps into the national service which begins with registration with the local board does not end until the registrant is *accepted* by the army, navy, or civilian public service camp." (Italics added) It is vital to ascertain, then, at what point petitioner was "accepted by the . . . civilian public service camp." On this point we are not left in doubt.

Section 651.31 (a) (1) of the Regulations states, "If in (a) of Item 65 [Report of Physical Examination and Induction (Form 221)] it is indicated that the registrant is physically and mentally qualified for general service, *he is acceptable* for work of national importance under civilian direction." (Bracketed words and italics added)

Section 652.1 (a)[4] adds: "When a registrant in Class IV-E has been found to be acceptable for work of national importance under civilian direction, the local board shall immediately notify the Director of Selective Service on a Conscientious Objector Report (Form 48) that the registrant is so acceptable and is available for assignment to work of national importance under civilian direction."

From these two sections of the Regulations, which have the legal force of an Act of Congress, it is seen that one classified IV-E was *finally accepted* for service when he successfully completed the final-type physical examination at the induction station. After that, routine reports were made, the ultimate result of which was that the Director of Selective Service finally sent the registrant an assignment to a certain civilian public service camp. (Reg. 652.2) Not until all this had been done was the assignee then sent the order to report for work of national importance. (Reg. 652.11, Form 50)

Applying the rules announced in the *Falbo* and *Billings* cases in the light of the plain wording of the regulations above quoted, it must be conceded that long before Falbo received the notice to submit to induction for national service, and at the time he successfully completed the final-type physical examination at the induction station, as to him the *selective process had been completed*, the government had made its choice and he had been finally accepted for service.

These facts and his acquired qualification for judicial review certainly were in no way changed by his subsequent

[4] 7 Fed. Reg. 112, Jan. 6, 1942. Sec. 653.11 (e), (f) and (g) was not added until July 15, 1943, subsequent to this case (8 Fed. Reg. 9867).

refusal to submit to induction, go to the camp and begin actual national service. It is true that he was prosecuted for that refusal, but our whole contention is that his defense pertaining to the illegality of the classification cannot be ruled out on the erroneous assumption that the selective process had not been completed and that he had not exhausted his administrative remedies.

In such contention we are supported not only by the plain wording of Section 651.31 and 652.1 of the Regulations, and by the ruling in the *Billings* case, but also by the reasonableness of the proposition. Any other view of the matter would lead to gross injustice and amount to a rule without reason. When a registrant successfully completes his final physical examination, then nothing else remains to be done except submitting to induction and reporting to camp at the time and place specified by the Selective Service System. There are no more hearings, no more appeals, no more physical examinations. Therefore, if a construction were placed upon the Regulations and the Act requiring the assignee to actually report at the camp, or to the local board to receive transportation to the camp, as a condition precedent to his attempting to urge the illegality of his classification as a defense to the indictment, then that construction is objectionable on two grounds:

(1) It requires an assignee to do a vain and needless thing before he can avail himself of this admitted defense.

(2) It makes a trap out of the Regulations so as to inflict greater pains and penalties upon a recalcitrant assignee who defies the board by refusing to submit to induction and go to camp than are allowed by Congress in the Act to be inflicted upon one who goes to camp and there defies the agency with his physical refusal to perform work to which he is assigned. These objections deserve a separate discussion.

Officials acting for the Selective Service System at CPS camps are without authority to change any assignee's classi-

fication, or of their own motion to provide for another physical examination. All that the camp officials can do is put the assignee to work. Obviously this is no administrative remedy and an assignee reporting to the camp cannot expect to obtain any relief by going there. The situation is no better if the selectee merely goes to the local board and refuses to accept transportation to the camp.

As to Falbo, the administrative process had been completed, he had been selected, and the only other thing required of him was that he submit to induction, go to camp and begin service. To require one to perform this last step of submitting to induction as a condition to his urging his defense against the indictment is a requirement without reason, vain and needless, for once he reports to the camp as ordered there would be no reason to prosecute him, unless he sneaked out of the camp by stealth and became a "deserter".[5] And, if he is prosecuted for leaving the camp, that is another and different charge than the one under consideration. Here we are concerned only with a charge of refusal to submit to induction.

A construction of the Act and Regulations that would require the assignee to perform the hypocritical act of going to the board merely to refuse to accept transportation to camp, or to report at camp after he had been accepted and assigned, in order to exhaust his administrative remedies is as absurd and immaterial as requiring the selectee to stand on his head, waik a tightrope, or jump in the lake before he can say that he has exhausted his administrative remedies and qualified himself for judicial review. Repeatedly this court has held that it is not necessary to comply with hollow formalisms and futile remedies before it can be said that administrative remedies have been exhausted and judicial review is available. *Utley* v. *St. Petersburg*, 292 U. S. 106; *Delaware & Hudson Co.* v. *Albany &*

[5] Reg. 632.17 (Fed. Reg., Jan. 24, 1942) also provides a wide latitude for infliction of penalties upon assignees remaining at camp for violation of rules.

Susq. R. Co. (1908), 213 U. S. 435. See also *N. L. Rel. B'd* v. *Carlisle Lumber Co.*, 94 F. 2d 138; *N. L. Rel. B'd* v. *Sunshine Mining Co.*, 110 F. 2d 780. This principle was clearly expressed in *Ex parte Cohen*, 254 F. 711, a draft case arising during the first world war. There it was said, "It is true that he [Cohen] did not appeal to the district board, as perhaps he should have done, but he ought not to be denied his rights to habeas corpus where his personal liberty and nationality are involved because of his failure to have done a vain thing. The local board for some reason took the matter up with the district board, which board approved the action of the local board, and hence to have appealed to them would have been an act of folly." Denying Falbo the defense which he sought to urge, and thus making his conviction certain, is just as serious as the reason relied on in the *Cohen* case to make unnecessary the compliance with vain administrative procedure.

Were the Act and Regulations construed so as to require a selectee to report to a CPS camp or to his local board to obtain transportation to the camp before he could urge his defense, the requirement would be objectionable because it makes a trap out of the procedure and subjects assignees to greater pains and penalties than those provided for in the Act. Had Falbo gone to his local board and refused to accept transportation to the camp he might have encountered some serious difficulties with the officials. Had he accepted the transportation and gone on to the camp, then he would have been required to "remain therein until released" and could not voluntarily leave. (Reg. 653.11, 653.12)[6] The result in either case would be that he would run the risk of being subjected to additional and greater pains and penalties than those provided in Section 11 of the Act. Besides, there always lurks the ever-present issue of waiver of rights by the one who voluntarily submits to induction.

[6] 7 Fed. Reg. 248, Jan. 14, 1942.

These are the very considerations that led the court in the *Billings* case to rule that a registrant could not be forced by duress and violence at the induction station to submit to induction against his will. The induction process, it is true, had not been completed, but the selective process had been completed when Billings was declared physically and mentally acceptable for service in the armed forces. If that acceptance terminated the selective process in the case of a registrant liable for training and service in the armed forces where selection and induction occurred consecutively, then acceptance of a registrant classified IV-E also terminates the selective process; and the fact that in Falbo's case the selective process was terminated and separated from induction by days does not alter the fact that the administrative process had been completed for the purpose of judicial review before the order issued so as to excuse him from duty of submitting to induction.

In this conclusion we are confirmed by recent amendments to the Selective Service Regulations. As in other cases, the interpretations of an Act of Congress by those charged with its administration are entitled to persuasive weight. Part 651 (Reg. 651.1-651.10), dealing with the process of determining acceptability of conscientious objectors for national service, has been abrogated. Part 652 (Reg. 652.1-652.14), setting forth the procedure for assignment and delivery of conscientious objectors to CPS camps, has been amended to conform with the "preinduction physical examination" procedure for combatants established January 1, 1944. Under the new procedure, conscientious objectors are subject to the same preinduction-examination procedure as registrants classified for the armed services. Men liable for training and service in the armed forces are accepted by the military when they have successfully completed the physical examination, while conscientious objectors are given an assignment to a CPS camp by the

Director of Selective Service if the physical examiners find them physically and mentally acceptable for such.

This serves to emphasize petitioner's contention that the rule announced in the *Billings* case, marking the end of the selective process as the time when the registrant is found to be physically and mentally acceptable to the armed forces, applies also to the procedure for conscientious objectors. It being acceptance upon or after the physical examination that completes the selective process of the administrative agency in regard to those chosen for the armed forces, it is also acceptance upon physical examination that terminates the administrative selective process for conscientious objectors.

Even when the petitioner concedes the *Falbo* rule requiring exhaustion of the administrative remedy by submitting to the selective process in its entirety before the petitioner can become qualified for judicial review of the classification and order, he nevertheless earnestly contends that the application of that rule to the facts and record of the case has been erroneously made, and which misapplication to facts and record in the *Falbo* case makes such conclusion inconsistent with the opinions expressed in the *Billings* case.

Attention of the court is now directed to a patent error in the *Falbo* opinion. It is this error that apparently led the court to affirm the conviction. The questionable portion of that opinion reads:

"Completion of the functions of the local boards and appellate agencies, important as are these functions, is not the end of the selective service process. The selectee may still be rejected at the induction center and the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp."

This indicates that the court proceeded on the assumption that the equivalent of the final physical examination, which then was rendered at the induction station in the case

of those liable for combatant duty, was given to conscientious objectors at the CPS camp. Were this true, then, of course, petitioner never would have had a final-type physical examination that could form a basis for finding that he became acceptable to be inducted for national service, and the affirmance of his conviction under the rule announced might possibly have been proper. But the fact is undisputed and clear in the record, that petitioner had been subjected to the "final-type physical examination", as provided by Part 651 of the Regulations, prior to the time he was ordered to submit to induction for work at the camp. Had this not been true, then the order upon which the indictment is based never could have been issued, for such order is issued only when the registrant has been examined and found acceptable. (Reg. 652.1) The court is in manifest error when it says that the conscientious objector may be rejected at the CPS camp, because the examination under Section 651.21[7] is to be conducted by the local board examining physician, not by the camp authorities. This was overlooked by the court.

Note 7 of the court's *Falbo* opinion proves that the court was in error. Therein quotation appears of part of Section 3 (a) of the Act, to wit, " . . . no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined".

Acceptableness, as the controlling factor, is here again emphasized.

The inference from the court's note just quoted is that Falbo could not have been found acceptable until he would submit to induction and go to camp, which inference is wholly erroneous, because prior to the date of issuance of the order that he submit to induction for work at the CPS

[7] 7 Fed. Reg. 277, Jan. 15, 1942.

camp he had been found acceptable, as herein previously pointed out.

Note 7 continues: "We are informed by the government that pursuant to this section approximately forty per cent of the selectees who report under orders of local boards for induction into the armed forces are rejected, and that, as of October 15, 1943, six hundred and ten of the eight thousand selectees who had reported for civilian work of national importance had been rejected." Here, perhaps more than anywhere else, the error of the court as to the procedure of acceptance prescribed by the Regulations becomes manifest. It must be remembered that when this controversy arose the process of induction for combatants differed from that for conscientious objectors. Combatants received their final examination at the induction station by the armed forces and, if found acceptable, induction followed immediately. As Note 7 shows, forty per cent of these were found to be unacceptable at the induction center and were returned to their local boards. Noteworthy and significant it is that the court does not state the percentage of non-combatants rejected by virtue of the "final-type physical examination" procedure conducted by the local board physician, which would be the proper figure to quote with the tabulated results of the final examination of combatants under Section 3 (a) of the Act. But instead of quoting this figure the court quotes the figures shown at page 56 of the Government's brief, namely the total number of registrants "rejected" at the CPS camp because of physical or mental disability. Such 'rejection' was not pursuant to Section 3 (a) of the Act as stated in Note 7. The court apparently misunderstood the Government's statement in this connection. According to that statement, the rejected 610 selectees for camps were rejected under provisions of Section 653.11 (c), which provides for rejection of those selectees who claim and indicate to camp operators that their physical condition changed subsequent to their final-type physical

examination which already had served to determine their acceptability for induction. This section does not provide for a general physical examination of all registrants reporting at the camp. Only those who assert that their condition has changed, after their acceptability for induction had been originally established, are eligible for this examination after arrival at CPS camps.

It is further significant to note that in giving these figures the Government does not say that any of these "selectees" had been *discharged* from the camps under this section of the Regulations, but it is merely said that "610, or approximately 7 percent, were *rejected*." Indeed it could not be said that the selectees had been "discharged" under this Regulation, for it is specifically provided in that very section that in event the selectee is examined at camp and found to be physically unfit for service, he will then "*be retained in the camp or hospitalized where necessary.*" This also serves to emphasize petitioner's contention that his *final acceptance* took place at the time he was declared acceptable for service after he had undergone the "final-type physical examination".

Accordingly, should an assignee submit to induction and go to camp, there he cannot be simply rejected and released to go his own way. He is at that time a part of the national-service establishment, in custody of the Selective Service officials controlling the camp, and he cannot leave that camp without a specific and special order from the Director of Selective Service. Section 653.12 provides that an assignee who has reported at the camp must "remain there until released or transferred elsewhere by proper authority."

Were it true, as assumed in the opinion heretofore written in this case, that all registrants are subject to a final-type physical examination for acceptance *at the camp*, and that one who there fails to qualify for service is thereupon rejected, there might be some reason for holding that a registrant would be required to submit to this examination

at the camp before he could say that he had "exhausted his administrative remedies." But such is not the true situation. That examination *at the camp* is for one who claims, after submitting to induction and arriving at the camp, that his physical condition has changed since he underwent final-type examination before being ordered to submit to induction. *At the camp* the one examined and found unfit is "rejected" but he is definitely not discharged from the camp or released from national service. He is kept in custody at the camp. Surely that *proves* that reporting *at the camp* is no part of the administrative remedy!

Any doubt as to that view is immediately dispelled by reference to the Regulations which were in effect prior to the adoption of the amended Regulations under which this controversy arose. Section 653.5 (c), promulgated on September 25, 1941 (6 Fed. Reg. 4663), has not lost its general effect as expressing the intent of the Director of Selective Service, and the procedure therein outlined has been incorporated into provisions of the present system.[8] This section, as it appears in Volume 3 of the Code of Federal Regulations, 1941 Supplement, page 2862, reads:

"*Physical examinations by the registrant's local board will be final in so far as acceptance of men at camp is concerned,* except that when conditions are reported which indicate presence of a communicable disease or a change in physical condition between the time of physical examination by the local board and the time of reporting at camp, a full report in writing will be made to the Camp Operations Division at the same time as D. S. S. Form 50 is mailed. *Assignees not accepted at the camp for the reason referred to above will be retained in camp or hospitalized where necessary pending instructions from the Camp Operations Division.*" (Italics added)

Under Regulations in effect when petitioner was ordered to report for induction into camp, it seems plain that the

[8] Reg. 651.31 (7 Fed. Reg. 277, Jan. 15, 1942) and 652.1-652.14 (7 Fed. Reg. 111, Jan. 6, 1942).

possibility of rejection because of a change of physical condition some time between the date of his final-type physical examination and the time he was scheduled to report at camp, does not and can not affect his right to judicial review. If he does not have a change or does not report a change of physical condition, there will be no examination and no possibility of being rejected at the camp.

Judicial review does not hinge on such chimerical uncertainties, especially when it is so plain that the regular administrative process of selection has been completed. It is utterly unreasonable that one, as a condition precedent to judicial review, should be required to appear at a camp, often hundreds, if not thousands, of miles away, when he has previously been "*finally*" examined, declared *acceptable* as a result thereof, and ordered to report for induction into national service. It is inescapable that the "selective process" ends, just as Section 651.31 (a) of the Regulations states, when the registrant has been found "acceptable" after his final-type physical examination by the local board physician. (Reg. 651.1-651.8, 7 Fed. Reg, 277, Jan. 15, 1942)

It cannot be said that Section 653.11 (c) provides any further administrative remedy any more than it can be said that the possibility of a discharge from the army is a further administrative remedy. If, during the 21-day period now in effect, the combatant inductee contacts a communicable disease rendering him unfit for service, under the ruling in the *Billings* case he would not be regarded as having failed to exhaust his administrative remedies if he should thereafter refuse to take the oath of induction. Why? Because the selective process ended when he was found acceptable by the armed forces at the first examination.

Since this is true, then it is likewise true that the remote possibility of a conscientious objector's discharge after arrival at the camp because of a change in physical condition (such as developing a severe case of cancer, being in an automobile accident, or being otherwise incapacitated)

should not cause the court to rule inconsistently that the assignee ordered to submit to induction and who refuses for good cause to do so had not exhausted his administrative remedies. The fact is that in the case of the conscientious objector the selective process ended and the administrative remedies had been completely exhausted when he was found acceptable for service at his final-type physical examination before being ordered to submit to induction.

As to this error and misapprehension of the effect of the Regulations, petitioner respectfully suggests that "it is never too late to be right." If this error is allowed to stand unchallenged, it will work untold hardship not only on petitioner, but upon the many others who now are in a similar position, and in future upon those who may be caught in similar circumstances under other administrative acts of Congress.

The court is referred to arguments appearing under Point ONE of the brief filed for petitioners in support of petitions for writs of certiorari in the cases of *Clayton* v. *United States* and *Stull* v. *United States*, which brief and petitions are filed simultaneously with this petition.

Further discussion also appears under the headings "PRELIMINARY" and "Clarification by 'Billings' Opinion" in another brief, supporting petitions for writs of certiorari in the companion cases of *Lohrberg* v. *Nicholson* and *Falbo* v. *Kennedy*, filed simultaneously with this second petition for rehearing. Such further discussion is here referred to and made a part hereof as though copied at length herein.

For additional grounds supporting this petition for rehearing, petitioner here refers to and incorporates herein each of the grounds asserted in each of the four petitions for writs of certiorari, filed simultaneously with this petition, in the cases of *Lohrberg* v. *Nicholson*, *Falbo* v. *Kennedy*, *Clayton* v. *United States*, and *Stull* v. *United States*.

Conclusion

Wherefore petitioner prays that the mandate issued by this Court be recalled and that the judgment theretofore entered herein affirming the judgments of the courts below, and the order overruling the first petition for rehearing, be set aside and held for naught, and that on the briefs and the first petition for rehearing heretofore filed and submitted, this second petition for rehearing be granted and the Court render an order reversing the judgments of the courts below, or, in the alternative, order reargument of this cause. Petitioner prays for such other relief to which he may show himself justly entitled in the premises.

NICK FALBO, *Petitioner*

By HAYDEN C. COVINGTON
VICTOR F. SCHMIDT
Counsel for Petitioner

Certificate

The undersigned counsel for petitioner hereby certifies that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for purpose of delay.

HAYDEN C. COVINGTON
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES.

No. 73.—October Term, 1943.

Nick Falbo, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 3, 1944.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner was indicted on November 12, 1942, in a federal District Court in Pennsylvania for knowingly failing to perform a duty required of him under the Selective Training and Service Act of 1940.[1] The particular charge was that, after his local board had classified him as a conscientious objector, he wilfully failed to obey the board's order to report for assignment to work of national importance.[2] Admitting that his refusal to obey the order was wilful, petitioner defended his conduct on the ground that he was entitled to a statutory exemption from all forms of national service, since the facts he had presented to the board showed that he was a "regular or duly ordained" minister.[3] The Act, he argued, does not make it a crime to refuse to obey an order to report for service if that order is based upon an erroneous classification, because there is no "duty" to comply

1 54 Stat. 885; 50 U. S. C. Appendix §§ 301-318. Section 11 imposes criminal sanctions for wilful failure or neglect to perform any duty required by the Act or by rules or regulations made pursuant to the Act.

2 Under Section 5(g) of the Act, a registrant who "by reason of religious training and belief" is conscientiously opposed to participation in war may be inducted into the land or naval forces but must be assigned to noncombatant service as defined by the President. If for similar reasons a registrant is conscientiously opposed even to participation in noncombatant service he is not to be inducted into the armed forces at all but "shall . . . be assigned to work of national importance under civilian direction." Regulations, not here challenged, impose on selectees a duty to obey board orders to report for induction or assignment.

3 Section 5(d) of the Act provides in part: "Regular or duly ordained ministers of religion . . . shall be exempt from training and service (but not from registration) under this Act." The local board refused to find that petitioner was a minister and further declined to classify him as a conscientious objector. Upon review a board of appeal, set up under Section 10(a)(2), sustained the local board's refusal to exempt petitioner as a minister, but directed that he be classified as a conscientious objector.

with a mistaken order. This defense was seasonably urged but the District Court declined to recognize it, expressing the view that, "the Board has the decision of whether or not this man is to be listed as he claims he should be;" and at the conclusion of the trial the jury was charged that, "If you find from the facts that he failed to report—and there is no evidence to the contrary . . .—it would be your duty to find him guilty." The result of the trial was a conviction and sentence to imprisonment for five years.

On appeal petitioner urged that the District Court had erred in refusing to permit a trial de novo on the merits of his claimed exemption. In the alternative, he argued that at least the Court should have reviewed the classification order to ascertain whether the local board had been "prejudicial, unfa.. and arbitrary" in that it had failed to admit certain evidence which he offered, had acted on the basis of an antipathy to the religious sect of which he is a member, and had refused to classify him as a minister against the overwhelming weight of the evidence. The Circuit Court of Appeals affirmed the District Court per curiam, 135 F. 2d 464. We granted certiorari because of the importance of the problems involved relating to administration of the Selective Training and Service Act of 1940, upon which problems the Circuit Courts of Appeal have not expressed uniform views.[4]

When the Selective Service and Training Act was passed in September, 1940, most of the world was at war. The preamble of the Act declared it "imperative to increase and train the personnel of the armed forces of the United States." The danger of attack by our present enemies, if not imminent, was real, as subsequent events have grimly demonstrated. The Congress was faced with the urgent necessity of integrating all the nation's people and forces for national defense. That dire consequences might flow from apathy and delay was well understood. Accordingly the Act was passed to mobilize national manpower with the speed which that necessity and understanding required.

The mobilization system which Congress established by the Act is designed to operate as one continuous process for the selection

[4] See, for example, Goff v. United States, 135 F. 2d 610, 612 (C. C. A. 4); Rase v. United States 129 F. 2d 204, 207 (C. C. A. 6); Ex parte Catanzaro, 138 F. 2d 100, 101 (C. C. A. 3); United States v. Kauten, 133 F. 2d 703, 706, 707 (C. C. A. 2); United States v. Grieme, 128 F. 2d 811, 814, 815 (C. C. A. 3).

of men for national service. Under the system, different agencies are entrusted with different functions but the work of each is integrated with that of the others. Selection of registrants for service, and deferments or exemptions from service, are to be effected within the framework of this machinery as implemented by rules and regulations prescribed by the President.[5] The selective service process begins with registration with a local board composed of local citizens. The registrant then supplies certain information on a questionnaire furnished by the board. On the basis of that information and, where appropriate, a physical examination, the board classifies him in accordance with standards contained in the Act and the Selective Service Regulations. It then notifies him of his classification. The registrant may contest his classification by a personal appearance before the local board, and if that board refuses to alter the classification, by carrying his case to a board of appeal,[6] and thence, in certain circumstances, to the President.

Only after he has exhausted this procedure is a protesting registrant ordered to report for service. If he has been classified for military service, his local board orders him to report for induction into the armed forces. If he has been classified a conscientious objector opposed to noncombatant military service, as was petitioner, he ultimately is ordered by the local board to report for work of national importance. In each case the registrant is under the same obligation to obey the order. But in neither case is the order to report the equivalent of acceptance for service. Completion of the functions of the local boards and appellate agencies, important as are these functions, is not the end of the selective service process. The selectee may still be rejected at the induction center and the conscientious objector who is opposed to noncom-

[5] Section 10(a)(2) of the Act provides in part that "... local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions of claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe." Pursuant to the grant of authority conferred by the Act the President, through appropriate executive agencies, has promulgated and from time to time amended comprehensive Selective Service Regulations.

[6] A registrant may not, however, appeal from the determination of his physical or mental condition. Selective Service Regulations, § 627.2(a).

batant duty may be rejected at the civilian public service camp.[7] The connected series of steps into the national service which begins with registration with the local board does not end until the registrant is accepted by the army, navy, or civilian public service camp. Thus a board order to report is no more than a necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently.

In this process the local board is charged in the first instance with the duty to make the classification of registrants which Congress in its complete discretion[8] saw fit to authorize. Even if there were, as the petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for national service. The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process.

We think it has not. The Act nowhere explicitly provides for such review and we have found nothing in its legislative history which indicates an intention to afford it. The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces. Careful provision was made for fair administration of the Act's policies within the framework of the selective service process. But Congress apparently regarded "a prompt and unhesitating obedience to or-

[7] Section 3(a) of the Act provides in part that " . . . no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: . . ." We are informed by the government that pursuant to this section approximately forty per cent of the selectees who report under orders of local boards for induction into the armed forces are rejected, and that, as of October 15, 1943, six hundred and ten of the eight thousand selectees who had reported for civilian work of national importance had been rejected.

[8] See Hamilton v. Regents of the University of California, Concurring opinion, 293 U. S. 245, 265, 266-268; see also Jacobson v. Massachusetts, 197 U. S. 11, 29; MacIntosh v. United States, 42 F. 2d 845, 847, 848; 283 U. S. 605, Dissenting opinion, 627, 632; United States v. Bethlehem Steel Corporation, 315 U. S. 289, 305.

ders" issued in that process "indispensable to the complete attainment of the object" of national defense. *Martin* v. *Mott*, 25 U. S. 19, 30. Surely if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so.

Against this background the complete absence of any provision for such challenges in the very section providing for prosecution of violations in the civil courts permits no other inference than that Congress did not intend they could be made. The instant case offers a striking example of the consequences of any other view. Petitioner, 25 years of age, unmarried, and apparently in good health, registered with his local board on October 16, 1940. He claimed exemption August 23, 1941. Consideration of his claim by the local board and the board of appeal delayed his classification, so that his final order to report was not issued until September 2, 1942. Today, one year and four months after this order, he is still litigating the question.

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 73.—October Term, 1943.

Nick Falbo, Petitioner, vs. United States of America. } On Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 3, 1944.]

Mr. Justice Rutledge, concurring.

I concur in the result and in the opinion of the Court except in one respect. Petitioner claims the local board's order of classification was invalid because that board refused to classify petitioner as a minister on the basis of an antipathy to the religious sect of which he is a member. And, if the question were open, the record discloses that some evidence tendered to sustain this charge was excluded in the trial court. But petitioner has made no such charge concerning the action of the appeal board which reviewed and affirmed the local board's order. And there is nothing to show that the appeal board acted otherwise than according to law. If therefore the local board's order was invalid originally for the reason claimed, as to which I express no opinion, whatever defect may have existed was cured by the appeal board's action. Apart from some challenge upon constitutional grounds, I have no doubt that Congress could and did exclude judicial review of Selective Service orders like that in question. Accordingly I agree that the conviction must be sustained.

SUPREME COURT OF THE UNITED STATES.

No. 73.—October Term, 1943.

Nick Falbo, Petitioner,
vs.
The United States of America.
} On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 3, 1944.]

Mr. Justice Murphy, dissenting.

This case presents another aspect of the perplexing problem of reconciling basic principles of justice with military needs in wartime. Individual rights have been recognized by our jurisprudence only after long and costly struggles. They should not be struck down by anything less than the gravest necessity. We assent to their temporary suspension only to the extent that they constitute a clear and present danger to the effective prosecution of the war and only as a means of preserving those rights undiminished for ourselves and future generations. Before giving such an assent, therefore, we should be convinced of the existence of a reasonable necessity and be satisfied that the suspension is in accordance with the legislative intention.

The immediate issue is whether the Selective Training and Service Act of 1940 must be interpreted so as to deprive alleged violators of the right to a full hearing and of the right to present every reasonable defense. Petitioner, a member of Jehovah's Witnesses, claimed to be a minister exempt from both military training and civilian work under the Act. After exhausting all the administrative remedies and appeals afforded by the Act, he was classified as a conscientious objector (Class IV-E) rather than as a minister (Class IV-D). Petitioner alleges that this classification was contrary to law and was the result of arbitrary action by his local board. On the assumption that these allegations are true, the subsequent order to report for assignment to work of national importance, which he disobeyed, must therefore be considered invalid. Our problem is simply whether petitioner can introduce evidence to that effect as a defense to a criminal prosecution for failure to obey the order.

Common sense and justice dictate that a citizen accused of a crime should have the fullest hearing possible, plus the opportunity to present every reasonable defense. Only an unenlightened jurisprudence condemns an individual without according him those rights. Such a denial is especially oppressive where a full hearing might disclose that the administrative action underlying the prosecution is the product of excess wartime emotions. Experience demonstrates that in time of war individual liberties cannot always be entrusted safely to uncontrolled administrative discretion. Illustrative of this proposition is the remark attributed to one of the members of petitioner's local board to the effect that "I do not have any damned use for Jehovah's Witnesses." The presumption against foreclosing the defense of illegal and arbitrary administrative action is therefore strong. Only the clearest statutory language or an unmistakable threat to the public safety can justify a court in shutting the door to such a defense. Because I am convinced that neither the Selective Training and Service Act of 1940 nor the war effort compels the result reached by the majority of this Court, I am forced to dissent.

It is evident that there is no explicit provision in the Act permitting the raising of this particular defense and that the legislative history is silent on the matter. Suffice it to say, however, that nothing in the statute or in its legislative record proscribes this defense or warrants the conviction of petitioner without benefit of a full hearing. Judicial protection of an individual against arbitrary and illegal administrative action does not depend upon the presence or absence of express statutory authorization. The power to administer complete justice and to consider all reasonable pleas and defenses must be presumed in the absence of legislation to the contrary.[1]

Moreover, the structure of the Act is entirely consistent with judicial review of induction orders in criminal proceedings. As the majority states, the Act is designed "to operate as one continuous process for the selection of men for national service," and it is desirable that this process be free from "litigious interruption." But we are faced here with a complete and permanent

[1] Otherwise the absence of clear statutory permission would preclude court review of induction orders in habeas corpus proceedings following actual induction, a result which this Court's opinion presumably does not intend to infer. Judicial review in such proceedings has become well settled in lower federal courts.

interruption springing not from any affirmative judicial intervention but from a failure to obey an order. A criminal proceeding before a court is therefore inevitable and the only problem is the availability of a particular defense in that proceeding. Hence judicial review at this stage has none of the elements of a "litigious interruption" of the administrative process.

No other barriers to judicial review of the induction order in a criminal proceeding are revealed by the structure of the Act. The "continuous process" of selection is unique, unlike any ordinary administrative proceeding. Normal concepts of administrative law are foreign to this setting. Thus rules preventing judicial review of interlocutory administrative orders and requiring exhaustion of the administrative process have no application here. Those rules are based upon the unnecessary inconvenience which the administrative agency would suffer if its proceedings were interrupted by premature judicial intervention. But since the administrative process has already come to a final ending, the reason for applying such rules no longer exists. And even if the order in this case were considered interlocutory rather than final, which is highly questionable, judicial review at this point is no less necessary. Criminal punishment for disobedience of an arbitrary and invalid order is objectionable regardless of whether the order be interlocutory or final.

Nor do familiar doctrines of the exclusiveness of statutory remedies have any relevance here. Had Congress created a statutory judicial review procedure prior to or following induction, the failure to take advantage of such a review or the judicial approval of the induction order upon appeal might bar a collateral attack on the order in a criminal proceeding. But Congress has erected no such system of judicial review. Courts are left to their own devices in fashioning whatever review they deem just and necessary.

Thus there is no express or implied barrier to the raising of this defense or to the granting of a full judicial review of induction orders in criminal proceedings. Courts have not hesitated to make such review available in habeas corpus proceedings following induction despite the absence of express statutory authorization. Where, as here, induction will never occur and the habeas corpus procedure is unavailable, judicial review in a criminal proceeding becomes imperative if petitioner is to be given any

protection against arbitrary and invalid administrative action.[2] It is significant that in analagous situations in the past, although without passing upon the precise issue, we have supplied such a necessary review in criminal proceedings. Cf. *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177; McAllister, "Statutory Roads to Review of Federal Administrative Orders," 28 California L. Rev. 129, 165, 166. See also *Fire Department of City of New York* v. *Gilmour*, 149 N. Y. 453, 44 N. E. 177; *People* v. *McCoy*, 125 Ill. 289, 17 N. E. 786.

Finally, the effective prosecution of the war in no way demands that petitioner be denied a full hearing in this case. We are concerned with a speedy and effective mobilization of armed forces. But that mobilization is neither impeded nor augmented by the availability of judicial review of local board orders in criminal proceedings. In the rare case where the accused person can prove the arbitrary and illegal nature of the administrative action, the induction order should never have been issued and the armed forces are deprived of no one who should have been inducted. And where the defendant is unable to prove such a defense or where, pursuant to this Court's opinion, he is forbidden even to assert this defense, the prison rather than the Army or Navy is the recipient of his presence. Thus the military strength of this nation gains naught by the denial of judicial review in this instance.

To say that the availability of such a review would encourage disobedience of induction orders, or that denial of a review would have a deterrent effect, is neither demonstrable nor realistic. There is no evidence that petitioner failed to obey the local board order because of a belief that he could secure a judicial reversal of the order and thus escape the duty to defend his country. Those who seek such a review are invariably those whose conscientious or religious scruples would prevent them from reporting

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[2] Judge Robert C. Bell of the federal district court in Minnesota, in his article "Selective Service and the Courts," 28 A. B. A. Journal 164, 167, states, "The courts are likely to be confronted with the question of what can be presented as a defense by a selectee in a criminal prosecution against him for a violation of the provisions of the Act of 1940. It appears that this question has not been decided. On principle, it would seem that the defendant should be permitted to offer as a defense the same questions that he could present in a habeas corpus proceeding, that is, the question of whether the board had jurisdiction, whether there was a fair hearing, or whether the action of the board was arbitrary or unlawful."

for induction regardless of the availability of this defense. And I am not aware that disobedience has multiplied in the Fourth Circuit, where this defense has been allowed. *Baxley* v. *United States*, 134 F. 2d 998; *Goff* v. *United States*, 135 F. 2d 610. Moreover, English courts under identical circumstances during the last war unhesitatingly provided a full hearing and reviewed orders to report for permanent service. *Offord* v. *Hiscock*, 86 L. J. K. B. 941; *Hawkes* v. *Moxey*, 86 L. J. K. B. 1530. Yet that did not noticeably impede the efficiency or speed of England's mustering of an adequate military force.

That an individual should languish in prison for five years without being accorded the opportunity of proving that the prosecution was based upon arbitrary and illegal administrative action is not in keeping with the high standards of our judicial system. Especially is this so where neither public necessity nor rule of law or statute leads inexorably to such a harsh result. The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution. I can perceive no other course for the law to take in this case.